No. 22473

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE E. MATTOS, SR., and
CLARA MATTOS,

Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

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JURISDICTIONAL STATEMENT

This action was originally brought in the Superior Court of the State of California (Sacramento County), against the individual respondents. It was removed to the district court under 28 U.S.C. 2679 and 28 U.S.C. 1442(a). The United States was substituted as a defendant for John J. Vaughn under 28 U.S.C. 2679(b). The district court dismissed the complaint. This court has jurisdiction of the appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Plaintiffs sue for the death of their son, Clarence Mattos. He was a member of the Marine Corps Reserve, with the rank of Private First Class, attached to the Motor Transport Maintenance Company, Maintenance Battalion, 4th Force Service Regiment. (R. 28-29). While on weekend training, he was riding as a passenger in a 2 1/2 ton M-35 truck. Both PFC Mattos and the driver, PFC Vaughn, were in the truck in the performance of their military duties in the Drivers' Training Platoon, a part of their unit. Ibid. The truck was the last in a convoy; while rounding a curve at an allegedly excessive rate of speed, it overturned, killing PFC Mattos. (R. 8; see Appellants' Brief pp. 3-4). This suit was brought in the Superior Court for the County of Sacramento against PFC Vaughn, who was driving the truck when it overturned; Captain Wakeman, Commanding Officer of the Motor Transport Maintenance Company; Captain Tucker, Inspector-Instructor of the Motor Transport Maintenance Company; and Lt. Hickey, Commander of the Drivers' Training Platoon. (R. 29).

On petition filed by the United States Attorney, the case was removed to the United States District Court. (R. 1). Two statutes were invoked as a basis for removal: 28 U.S.C. 1442(a) and 28 U.S.C. 2679. 28 U.S.C. 1442(a) provides for removal of actions against officers of the United States for acts done under color of office. 28 U.S.C. 2679 provides for removal of civil actions against Government employees on account of operation of

ny motor vehicle in the course of employment. The latter tatute, known as the "Government Drivers Act", also provides or substitution of the United States as defendant upon certifi- ation that the defendant employee was acting within the scope f his employment. 28 U.S.C. 2679(d). In accordance with this tatute, the United States was substituted for the defendant FC Vaughn. (R. 21-22).

The district court then dismissed the complaint. (R. 46). s to the United States, the court ruled that the case was overed by Feres v. United States, 340 U.S. 135 (1950). That ase held that the United States is not liable under the Federal ort Claims Act for injuries to servicemen arising from activity ncident to military service. The district court rejected laintiffs' argument that Feres should not be applied to reservists hile on weekend training (R. 44):

> I agree with defendants that the compelling necessity for military discipline is required in any military unit which is expected to function as such, especially while its members are in training. Thus, I do not believe the distinction that plaintiffs would have me draw between regulars and reservists is a viable one.

s to the individual defendants, the district court dismissed n the authority of this Court's decision in Bailey v. Van uskirk, 345 F. 2d 298 (9th Cir. 1965), certiorari denied, 383 .S. 948, which held that "one soldier may [not] sue another or negligent acts performed in the line of duty." 345 F. 2d t 298.

STATUTES INVOLVED

28 U.S.C. 1442(a), provides in relevant part:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
>
> * * * *

The Government Drivers Act, 28 U.S.C. 2679(b)-(e), provides in relevant part:

> (b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.
>
> * * * *
>
> (d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under

the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

* * * *

ARGUMENT

Summary

1. Dismissal of the suit as to the United States was required by Feres v. United States, 340 U.S. 135. That case held that a suit does not lie against the United States on account of the injury or death of a soldier arising out of activity incident to service. Feres covers reservists while they are engaged in military training. The Marine Corps Reserve is a military organization, and while engaged in military training it has as great a need for discipline as the regular Marine Corps. Moreover, the compensation benefits payable with respect to injury or death of Marine Corps Reservists are identical to those payable in the case of regular members of the Marine Corps.

2. Dismissal of the suit was also proper as to the individual defendants. It has long been the rule that a soldier may not be sued for injury negligently inflicted on another soldier in the course of duty. As this Court pointed out in Bailey v. Van Huskirk, 245 F. 2d 298 (1965), certiorari denied, 383 U.S. 948, the same considerations of policy which precluded suit in Feres apply where the individual soldier is sued. Nor does this rule

apply only to soldiers superior in rank to the injured soldier. All soldiers, regardless of rank, are governed by military order and subject to military discipline. Their responsibility is to the military authorities, rather than to the civil courts, for negligent conduct which injures another soldier. Thus dismissal was proper as to PFC Vaughn as well as the other individual defendants, even though PFC Vaughn did not outrank PFC Mattos.

3. The district court had jurisdiction to decide the case on the merits as to PFC Vaughn. Even if the Government Drivers Act would require a remand to the State court absent any other basis for federal jurisdiction, where the remedy against the United States is precluded by Feres (and we show in Point IV that the Government Drivers Act does not so require), federal jurisdiction here was sustainable under 28 U.S.C. 1442(a). That statute provides for removal of suits against federal officers for acts under color of office. It clearly covers the claims made here against PFC Vaughn's superior officers. And while the application of the statute to PFC Vaughn himself might be doubtful were he the only defendant, this Court has held that where removal is sustainable under 28 U.S.C. 1442(a) as to some defendants, federal jurisdiction may be exercised as to all defendants, even where no basis for federal jurisdiction other than Section 1442(a) exists. Murphy v. Kodz, 351 F. 2d 163 (1965).

4. Finally, the Government Drivers Act itself required the district court to dismiss the case as to PFC Vaughn, once it was conceded that he was acting within the scope of his

Government employment. That Act was designed to protect Government drivers from suits and from the expense of liability insurance for driving in the course of their employment. It achieved this purpose by remitting the injured party to suit against the United States wherever the Government driver was acting within the scope of his employment. The protection which the Act affords to the Government driver is not lost if, for some reason not relating to the scope of employment issue, the plaintiff is unable to obtain a recovery under the Tort Claims Act. For the Drivers Act does not guarantee the plaintiff recovery under the Tort Claims Act; it merely provides that suit under the Tort Claims Act is the only remedy which the plaintiff may pursue.

I

THE FERES CASE RENDERS THE UNITED STATES IMMUNE FROM SUIT UNDER THE TORT CLAIMS ACT FOR INJURIES SUSTAINED BY RESERVISTS PARTICIPATING IN MILITARY TRAINING, INCLUDING WEEKEND DRILLS.

In Feres v. United States, 340 U.S. 135, the Supreme Court held that the United States is not liable under the Federal Tort Claims Act for the death or injury of soldiers arising out of activity "incident to service." Although the facts of Feres involved regular soldiers, the case clearly applies also to reserve components of the Armed Forces. The purpose of military reserve components, including the Marine Corps Reserve, is "to provide trained units and qualified persons available for active duty in the armed forces in time of war or national emergency * * *." 10 U.S.C. 262. Indeed, the

Marine Corps Reserve is defined by law to be part of the Marine Corps. 10 U.S.C. 5001(a)(2). Thus the district court correctly concluded that the Marine Corps Reserve is a military organization and that Marine Corps Reservists, while in military training are in a military status -- a status held in Feres to be inconsistent with suits under the Federal Tort Claims Act. As the district court pointed out, "military discipline is required in any military unit which is expected to function as such, especially while its members are in training." (R. 44). The fact that reservists spend most of their time in civilian life does not detract from the need for military discipline while the reserve unit is in training.

It is also important to note that the same administrative compensation benefits are payable in cases of injury or death sustained by Marine Corps Reservists, as in cases involving regular members of the Marine Corps. These benefits are payable regardless of whether the training is for six months, two weeks, or a weekend. The compensation statute provides:

> A member of the * * * Marine Corps Reserve * * * who is ordered to active duty, or to perform inactive-duty training, for any period of time, and is disabled in line of duty while so employed, or the beneficiary of such a member who dies from such an injury, is entitled to the same pension, compensation, death gratuity, and hospitalization benefits as are provided by law or regulation in the case of a member of the * * * Regular Marine Corps of the same grade and length of service.

10 U.S.C. 6148(a). This statute expressly rejects the distinction which appellants seek to draw between short and long periods of

raining: for purposes of compensation benefits, a Marine Corps eservist ordered to active or inactive duty training "for any eriod of time" is entitled to the same benefits as a regular, nd the same death benefits are payable to his survivors. 1/

In short, from the standpoint of both military discipline nd the availability of administrative compensation benefits, arine Corps Reservists are plainly within the Feres decision. 2/ oreover, the cases are unanimous in holding reservists to be overed by Feres while attending weekend or evening drills. hus in O'Brien v. United States, 192 F. 2d 948 (8th Cir. 1951), man who had just joined a Naval Reserve unit was killed on a light taken as part of his indoctrination, during a weekend rill. And in United States v. Carroll, 369 F. 2d 618 (8th Cir. 966), a Naval Reservist was injured while riding to a weekend

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/ The statute does draw a time distinction with respect to isability resulting from a disease: in such a case, adminitrative benefits are payable only if the reservist is on a eriod of duty of 30 days or more. 10 U.S.C. 6148(b).

/ The Feres decision itself laid heavy stress on the availaility of administrative compensation (340 U.S. at 144-46), and id not discuss military discipline. In Johansen v. United States, 43 U.S. 427, 440, the Court stated: "This Court accepted the rinciple of the exclusive character of federal plans for comensation in Feres v. United States." See also Patterson v. United tates, 359 U.S. 495, and United States v. Demko, 385 U.S. 149. owever, in United States v. Brown, 348 U.S. 110, 112, the Court tated that Feres was based on the "peculiar and special relaionship of the soldier to his superiors, the effects of the aintenance of such suits on discipline, and the extreme results hat might obtain if suits under the Tort Claims Act were allowed or negligent orders given or negligent acts committed in the ourse of military duty."

drill on a military aircraft. In both cases Feres was applied even though the reservist was not actually participating in military training when the accident occurred; in the present case, where PFC Mattos was actually engaged in military training, the necessity for applying Feres is even clearer. The present case is in all respects similar to Layne v. United States, 295 F. 2d 433 (7th Cir. 1961), where Feres was applied to preclude recovery for the death of an Air National Guard pilot while on a training flight. See also Drumgoole v. Virginia Electric & Power Company, 170 F. Supp. 824, 825 (E. D. Va. 1959), where the court held that Feres applies to "the enlisted reserve when in training." 3/

The foregoing establishes that the case was properly dismissed as to the United States. We now show that dismissal as to the individual defendants was also required.

3/ Drumgoole involved reservists injured while on active duty training. They sued the Power Company, which in turn impleaded the United States. The district court dismissed the third-party complaint on the ground that, under Feres, the United States could not be held liable to the original plaintiffs, and thus could not be held liable to the Power Company for contribution or indemnity.

II.

INDIVIDUAL SOLDIERS ARE ALSO IMMUNE FROM SUIT ON ACCOUNT OF INJURIES SUSTAINED BY OTHER SOLDIERS IN THE COURSE OF ACTIVE DUTY.

All the individual defendants -- including PFC Vaughn, the driver of the truck -- are also immune from suit on account of PFC Mattos' death. As this Court held in Bailey v. Van Buskirk, 345 F. 2d 298 (1965), certiorari denied, 383 U.S. 948, "It is not yet within the American legal concept that one soldier may sue another for negligent acts performed in the line of duty." 345 F. 2d at 298. The Third Circuit has reached the same conclusion. Bailey v. DeQuevedo, 375 F. 2d 72 (1967), certiorari denied, 389 U.S. 923. 4/ The California courts also prohibit suits by one soldier against another for negligent acts in the course of duty. Curnutt v. Holk, 230 Cal. App. 2d 580, 41 Cal. Rptr. 174 (2d Dist. 1964). 5/ The principle of these cases dates back to Johnstone v. Sutton, 1 T.R. 492, 99 Eng. Rep. 1215 (1786), where Lord Mansfield expressed concern lest allowance of an action for malicious prosecution by a naval officer against his

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4/ The Third Circuit case involved the same facts as the Ninth Circuit decision, but with a different defendant (the plaintiff had obtained service over only one of the two Army surgeons involved in California, and thus brought a separate suit against the other surgeon in Pennsylvania). The Third Circuit decided the case on the merits, without reaching the defendant's contention that the judgment in the Ninth Circuit case was res judicata. 375 F. 2d at 74.

5/ In Curnutt v. Holk, a group of Air Force personnel were hunting on the base runway, pursuant to orders to clear the runway of deer, which were a hazard to aircraft. Defendant negligently discharged his shotgun while picking it up, injuring plaintiff. The District Court of Appeal stated that "under the facts alleged in the complaint a cause of action would be stated against the defendant were the parties civilians engaged in a hunting expedition." 230 Cal. App. 2d at 584, 41 Cal. Rptr. at 176. Nevertheless, the court held that recovery was precluded by the military status of the parties.

commander would lead to judicial intrusion into the military, reducing the armed forces of the nation to a "rabble, dangerous to their friends, and harmless to their enemies." And the Feres case itself supports an immunity for the individual soldiers involved: as Chief Judge Chambers observed in Bailey v. Van Buskirk, supra, "the same policy considerations govern here." 345 F. 2d at 298. 6/

The immunity of an individual soldier for injury inflicted on another soldier in the course of military duty is not confined to suits by subordinates against their superiors in rank. Thus the immunity here protects PFC Vaughn, as well as the other individual defendants who were superior in rank to PFC Mattos. For example, in Curnutt v. Holk, supra, the injured party was a Lieutenant Colonel while the defendant was a Captain; the California District Court of Appeal nevertheless held that the military status of the parties precluded suit for injury sustained in the course of military duty. And while in Bailey v. Van Buski

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6/ The Feres rule applies in cases where the plaintiffs are the survivors of a deceased soldier, rather than the soldier himself. Van Sickel v. United States, 285 F. 2d 87 (9th Cir., 19 Indeed, Feres itself involved a suit for wrongful death brought by an executrix. Since "the same policy considerations govern" where the individual soldier is sued, the result is not changed by the fact that the plaintiffs here are PFC Mattos' survivors.

upra, and Bailey v. DeQuevedo, supra, the injured party was a
ergeant and the defendants a Colonel and a Captain, the result
ould hardly have been affected if the injured party had been
Colonel, or if the defendants had been medical technicians
ith enlisted rank, rather than doctors with officer rank. There
re many cases in which Feres has been applied even though the
elative rank of the individual tortfeasor and the victim does
ot appear; 7/ indeed, Feres has been applied where the alleged
ndividual tortfeasors were civilian employees of the Government. 8
learly, the relative rank of the victim and the individual
ortfeasor has not been thought relevant in applying Feres.
ince, as this Court stated in Bailey v. Van Buskirk, supra,
he same policy considerations govern here as in Feres, the
ank of the individual tortfeasors should also be deemed irrelevant.

/ In Griggs v. United States, one of the three cases decided
the Feres opinion, plaintiff's decedent was a Lieutenant
olonel; the record does not reveal what rank the individual
ortfeasors held. See Griggs v. United States, 178 F. 2d 1
0th Cir. 1949). In several other cases in which Feres has
een applied, the relative rank of the victim and the individual
ortfeasor does not appear. Zoula v. United States, 217 F. 2d
(5th Cir. 1954); Orken v. United States, 239 F. 2d 850 (6th
r. 1956); United States v. United Services Automobile Ass'n,
8 F. 2d 364 (8th Cir. 1956).

/ Layne v. United States, 295 F. 2d 433 (7th Cir. 1961). In
at case, plaintiff's decedent was a Major; his death was
legedly due to civilian control tower operators.

The reasons for the military immunity apply with equal force to PFC Vaughn as well as to Captains Wakeman and Tucker and Lt. Hickey. PFC Vaughn was driving the last truck in the convoy as part of a drivers' training exercise engaged in by his platoon. (R. 8, 28-29, Appellants' Brief, pp. 3-4). Thus PFC Vaughn's presence behind the wheel, the degree of preparation he had before assuming the task of driving the truck, and the speed at which the convoy was traveling -- all these vital matters were subject to military command, and were basically a military responsibility. PFC Vaughn's duty was owed to his superiors, not to PFC Mattos. Individual civil liability would be justified only if PFC Vaughn were in the position of individually deciding whether he had sufficient training to drive the truck on a public highway with passengers, and what speed he should maintain as the last truck in the convoy. Yet clearly PFC Vaughn was acting under orders, and to the extent that these orders left him any discretion, he was accountable to his superiors rather than to his individual passengers.

It should also be noted that the amount of administrative mpensation that appellants may be entitled to under 10 U.S.C. 48 depends in no way on the rank of the individual tortfeasor. ie observation made by Chief Judge Chambers in Bailey v. Van iskirk, supra, applies regardless of whether the defendant is a lonel, as in that case, or a Private First Class, as here:

> The military service does not leave those permanently injured [or, it may be added, the survivors of those killed] in line of duty uncompensated. Congress has attended to such things in a reasonably adequate way. All we deny plaintiff-appellant is a remedy he likes better.

45 F. 2d at 298.

The foregoing establishes that the district court correctly smissed the complaint as to the individual defendants who were ie superior officers of PFC Mattos. We have also established iat appellants have no claim against PFC Vaughn. The district ourt did not reach the question of whether the case should be smissed as to PFC Vaughn, since it had substituted the United ates for PFC Vaughn as a defendant under the Government Drivers ct. However, the district court's judgment (R. 46) has the ffect of dismissing the action as to all defendants. Appellants w argue that, having dismissed the case as to the Government, ie district court should have remanded the suit against PFC ughn to the State court, rather than entering a judgment dis- ssing the complaint. 9/ We now show: (1) that 28 U.S.C. 1442(a)

/ Appellants made no motion to remand in the district court.

supplies an independent basis for retention of jurisdiction over the claim against PFC Vaughn, irrespective of the provisions of the Government Drivers Act, and (2) alternatively, that the Government Drivers Act does not require a remand to the State court where the case against the Government is dismissed on the basis of the Feres doctrine.

III.

UNDER 28 U.S.C. 1442(a), THE DISTRICT COURT HAD JURISDICTION TO DISMISS THE ACTION AS TO ALL INDIVIDUAL DEFENDANTS, INCLUDING THE GOVERNMENT DRIVER.

Appellants argue that the Government Drivers Act requires a remand to the State court where, after a suit has been removed to the federal court and the Government has been substituted as defendant for its employee driver, the case is dismissed on the merits as to the Government. Subsection (d) of the Government Drivers Act directs a remand to the State court "[s]hould a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit * * * is not available against the United States." 28 U.S.C. 2679(d). However, the Government Drivers Act does not require remand where an independent basis of federal jurisdiction exists. Thus, for example, remand would not be required if diversity jurisdiction existed with respect to the Government driver. Here removal of the case as to all the individual defendants, including PFC Vaughn, was accomplished under 28 U.S.C. 1442(a). That statute justified retention of federal jurisdiction over PFC Vaughn, even if the Government Drivers Act would otherwise have required a remand.

28 U.S.C. 1442(a) authorizes removal to a federal court of
action in a State court against "any officer of the United
tes or any agency thereof, or person acting under him, for
act under color of such office." Application of this statute
clearly proper as to the defendants who were PFC Vaughn's superior
icers. And while the application of the removal statute to
Vaughn might be doubtful[10/] were he the only defendant, this Court
squarely held that where removal as to some defendants is
per under 28 U.S.C. 1442(a), the district court may retain
risdiction as to all defendants, even though no other basis for
deral jurisdiction exists. Murphy v. Kodz, 351 F. 2d 163 (1965). 1

/ Several district court decisions have held 28 U.S.C. 1442(a)
applicable to Government drivers charged with negligence.
as v. Mitchell, 233 F. Supp. 414 (D. Md. 1964); Ebersole v. Helm,
F. Supp. 277 (E.D. Pa. 1960); Fink v. Gerrish, 149 F. Supp.
(S.D.N.Y. 1957); Goldfarb v. Muller, 181 F. Supp. 41 (D.N.J.
9). Contra: Pepper v. Sherrill, 181 F. Supp. 40(E.D. Tenn.
8).

On the other hand, removal has been held proper in cases in-
ving complaints charging medical malpractice by Government doc-
s. Allman v. Hanley, 302 F. 2d 559 (5th Cir. 1962); Blitz v.
g, 328 F. 2d 596 (2d Cir. 1964), certiorari denied, 379 U.S.
.

/ Under Murphy v. Kodz, the district court would have discre-
n to remand the case as to PFC Vaughn to the State court. 351
2d at 167-68. However, since appellants never moved for a
and in the district court, they cannot now ask this Court to
d that the district court should have exercised its discretion
remand. Moreover, the circumstances of the present case would
e clearly militated against any exercise of discretion to re-
nd. For here the case may properly be disposed of as to all
endants in one proceeding. Moreover, the suit against PFC
ughn involves a federal question, which the federal courts may
propriately decide. See Curnutt v. Holk, 230 Cal. App. 2d
, 584, 41 Cal. Rptr. 174, 176 (2d Dist. 1964): "The rights
liabilities of members of the Armed Forces of the United
tes arising from acts occurring while acting under orders in
e of duty is one of federal military law." See Feres v. United
tes, 340 U.S. 135, 142-144.

IV.

THE GOVERNMENT DRIVERS ACT PROTECTS GOVERNMENT DRIVERS FROM LIABILITY FOR NEGLIGENT DRIVING WITHIN THE SCOPE OF THEIR EMPLOYMENT; THIS PROTECTION IS NOT LOST BY THE PLAINTIFF'S INABILITY TO OBTAIN A RECOVERY AGAINST THE UNITED STATES.

If the Court agrees with our position that the district court had jurisdiction under 28 U.S.C. 1442(a) to dismiss the case as to PFC Vaughn, and further agrees that dismissal was proper because of the military status of the parties, then it is not necessary to reach any further question. However, there is an alternative basis for affirming the dismissal as to PFC Vaugh In our view, the Government Drivers Act does not require remand to the State court for reinstatement of the suit against the individual Government driver in cases where, although the driver was acting in the scope of his employment, the plaintiff for so reason fails to obtain recovery against the Government. Instead remand to the State court is required only where it is shown tha the Government driver was not acting within the scope of his employment.

The question here presented is presently before this Court in an appeal from a ruling of Judge Thompson in Van Houten v. R et al., D. Nev. Civil No. 1911-N, decided September 1, 1967, appeal pending C.A. 9, No. 22,356. In that case, suit was brought against a Government driver by a co-employee. After substitution of the Government as a defendant, the case against the Government was dismissed on the ground that plaintiff's exclusive remedy against the United States was under the Federal

Employees Compensation Act. Since that Act does not protect the individual defendant from liability (see Allman v. Hanley, 302 F. 2d 559 (5th Cir. 1962)), Judge Thompson initially concluded that the suit against the individual driver should be reinstated. Upon reconsideration, however, Judge Thompson changed his view:

> [T]he net result [of allowing the suit against the individual driver] is to attribute to Congress an intent when it adopted the Government Drivers Act amendment to the Federal Tort Claims Act which affronts common sense. Under that interpretation, a federal employee driver of a motor vehicle in the course of his employment is normally exonerated from personal liability, but not so if the injured person is another federal employee who has a claim for compensation under the Federal Employees Compensation Act. An intent to engraft such an incongruous exception to the general immunity from personal liability cannot be found in the language of the statute nor in the legislative history.
>
> The Court's earlier viewpoint was founded on the statutory language, "the remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death * * * shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee of his estate."
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> The Court now has concluded that this plaintiff, although a federal employee having rights under the Federal Employees Compensation Act, is still a person to whom the statutory language, "the remedy against the United States provided by section 1346(b)" applies. Section 1346(b) encompasses "claims * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." This is exactly such a case, and there is no provision of the Federal Tort Claims Act which would disqualify Van Houten

> as a claimant or plaintiff thereunder. Congress, in the Government Drivers Act, 28 U.S.C. 2679(b), incorporated Section 1346(b) by reference as a description of the class of cases to which the exclusivity of the remedy against the Government and the immunization of the individual federal employee from liability apply. The fact that for some extraneous reason the particular plaintiff cannot successfully maintain suit under the Federal Tort Claims Act should not change the result.

Judge Thompson's reasoning is fully applicable here. It would indeed be "incongruous" if the Government Drivers Act wer construed to protect PFC Vaughn from suit by a civilian injured by his driving of a military vehicle, but to allow the suit whe the victim of the accident is another soldier. The suit agains PFC Vaughn is covered by 28 U.S.C. 1346(b), since it is a claim arising out of a Government employee's alleged negligence in th scope of his employment. Thus, under the exclusivity provision of the Government Drivers Act, 28 U.S.C. 2679(b), plaintiffs mu look to Section 1346(b) for their recovery. The fact that for some reason they cannot obtain recovery, does not remove the pr tection accorded by the Act to Government drivers acting within the scope of their employment.

The legislative history confirms Judge Thompson's reading of the statute. The Government Drivers Act was enacted to protect Government drivers from the threat and burden of suits and judgments resulting from driving on the job. H. R. Rep. No. 29 87th Cong. 1st Sess., at 3-4. The Act was intended to protect the employee "from any personal liability where it is conceded that he was acting within the scope of his employment." 107

ong. Rec. 18500 (Sen. Keating). 12/ Such protection would be llusory if it did not apply to suits by co-employees: indeed, llowance of such suits would require Government drivers to ob- ain liability insurance covering their Government driving -- n expense which it was the purpose of the Act to avoid.

Subsection (b) of the Drivers Act, 28 U.S.C. 2679(b) -- hich makes the remedy against the Government "exclusive" of any uit against the employee -- is the "basic provision of the bill." .R. Rep. No. 297, 87th Cong. 1st Sess., at 4. Subsection (d), 8 U.S.C. 2679(d), is a procedural provision applicable only where he original suit is brought in a state court, and should not be ead to cut back the protection afforded by the exclusivity pro- ision. 13/ The provision in subsection (d) requiring remand here "a remedy by suit within the meaning of subsection (b) of his section is not available against the United States," refers ack to the exclusivity provision of subsection (b) -- which, as udge Thompson pointed out, protects the employee whenever he

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12/ The bill as it emerged from the Senate Judiciary Committee ould have permitted a plaintiff the choice as to whether his ction was to be removed to the federal court for trial under he Tort Claims Act. S. Rep. No. 736, 87th Cong. 1st Sess., t 5, 18. A similar provision had led to a Presidential veto of n earlier bill. House Misc. Documents, 86th Cong. 2d Sess., Docu- ent No. 415. The provision was deleted from the Judiciary Com- ittee's bill on the Senate floor, and instead the present pro- ision -- requiring removal upon certification by the Attorney eneral that the driver was acting in the scope of his employ- ent -- was inserted. Senator Keating explained that the bill s adopted "makes certain that suits will not be removed im- roperly, but protects the employee from any personal liability here it is conceded that he was acting within the scope of his mployment." 107 Cong. Rec. 18500.

13/ Subsection (d) would not apply where the original suit was rought in the federal court on the basis of diversity juris- iction. The scope of protection afforded the Government driver as clearly not intended to depend on whether the suit against im was originally brought in the State or federal court. Thus he application of subsection (d) cannot affect the employee's rotection from suit.

was acting in the scope of his employment. Thus when the district court conducts a remand hearing under subsection (d), the purpose is simply to determine whether the driver was acting in the scope of his Government employment. The purpose of the remand hearing is not to determine whether the plaintiff will ultimately succeed in recovering against the Government.

The authorities support this reading of the Drivers Act. Van Houten v. Ralls, et al., supra; Beechwood v. United States, 264 F. Supp. 926 (D. Mont. 1967); see Noga v. United States, 272 F. Supp. 51 (N.D. Calif. 1967), appeal pending. Similarly, in Hoch v. Carter, 242 F. Supp. 863 (S.D.N.Y. 1965); Reynaud v. United States, 259 F. Supp. 945 (W.D. Mo. 1966); and Fancher v. Baker, 240 Ark. 288, 399 S.W. 2d 280 (1966), the courts held the Government driver immune from liability in situations where the Tort Claims Act remedy was unavailable because the limitation period had expired.

The only support for appellant's position is a statement in Tavolieri v. Allain, 222 F. Supp. 756 (D. Mass. 1963); this statement was pure dictum, since there the remand was on the ground that the driver was not acting within the scope of his Government employment. The other cases cited by appellant are completely inapposite. 14/

14/ In Adams v. Jackel, 220 F. Supp. 764 (E.D.N.Y. 1963), the court denied a motion to dismiss by the individual defendant on the ground that it might still be shown at a remand hearing that he was not acting in the scope of his Government employment. In Atnip v. United States, 245 F. Supp. 386 (E.D. Tenn. 1965), the court denied a motion to remand, on the ground that the individua defendant was within the scope of his Government employment. In Jarrell v. Gordy, 162 So. 2d 577 (La. App. 1964), the court refused to hold the Government driver immune from suit, on the grou that the United States had not removed the case to the federal court and effected a substitution of parties.

To summarize, the Government Drivers Act remits a person injured by a Government driver to his suit against the United States under the Federal Tort Claims Act. It does not guarantee that he will be able to obtain recovery in that suit.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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MAY 1968

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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ROBERT V. ZENER, being duly sworn, deposes and says:

That on May 9, 1968, he caused three copies of the foregoing Brief for the Appellees to be served by air mail, postage prepaid, upon counsel for appellants' as follows:

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Subscribed and Sworn to before
me this 9th day of May, 1968.

Audrey Anne Crump
NOTARY PUBLIC

My Commission expires August 31, 1971.